

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
JOSEPH W. AND ELSIE M. CUMMINGS }

For Appellants: Henry I. Dockweiler, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax Counsel;
A. Ben Jacobson, Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of Joseph W. and Elsie M. Cummings to proposed assessments of additional personal income tax, including penalties, for years- and in amounts as follows:

<u>Joseph W. Cummings</u>	<u>Elsie M. Cummings</u>	<u>Both, jointly</u>
1943	\$296.00	\$177.94
1944	293.51	79.20
1945		135.81
1946	417.03 326.50	178.94
1947	693.09	301.70
1948		368.61
1949	493.08 ,,,,,,	810.79
1950	553.61 929.56	1,269.63
1951	717.63	973.09
1952		\$1,617.13
1953		1,709.00
1954		3,035.60

Appellants are husband and wife. Mrs. Cummings has a daughter (born, in 1927, Marguerite Meagher) by a previous husband. Prior to the years in question, Appellants had their domicile and residence in Illinois. They were registered to vote in that State until 1945. Mr. Cummings was engaged in the practice of law in Chicago. In 1936 Appellants acquired a home in Ojai, California, and until 1943, they spent from six to nine weeks each winter in this home. In 1942 they spent several months in California, and Mrs. Cummings, acting for her daughter and using her daughter's funds, purchased a ranch near Ojai. In 1943 and 1944 Mr. Cummings attempted to operate the ranch as a business venture. Meanwhile the gross income from his law practice declined to less than \$1,000 per year. In 1944 Appellants sold their home in Illinois. In 1945 they bought a home on Lake Tahoe in Nevada and

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registered to vote in that State. In 1953 Mrs. Cummings' daughter bought a home near Ojai, using it as a part-time residence. In the same year Appellants sold their home in Ojai and thereafter used the daughter's home during their stays in California.

During the years on appeal, 1943 through 1954, Appellants averaged about 6.8 months of each year in California, 1.5 months in Illinois, 3.0 months in Nevada, and the remaining time elsewhere. During this period they spent from 5.5 to 8.5 months of each year in California, consistently more time than in any other State. They maintained an active bank account in Ojai and apparently maintained their Ojai home year-round until it was sold. Mr. Cummings' daughter undertook all her schooling during 1943, 1944 and 1945 in California.

In 1955, pursuant to a request of the Franchise Tax Board, Appellants filed returns for the years on appeal. These returns showed that their income was solely from intangibles, from real estate located outside the State and from fees for professional services rendered in Illinois. Appellants claimed that they were residents of and domiciled in Illinois until June, 1945, and thereafter Nevada; that during none of these years in question did either of them receive any income from California sources; and, therefore, that none of their income was subject to the California income tax. The Franchise Tax Board determined that they were residents and proposed the assessments in question.

Section 2(k) of the Personal Income Tax Act, during the period January 1, 1943, to June 30, 1945, provided

"Every natural person who is in the State of California for other than a temporary or transitory purpose is a resident and every natural person domiciled within this State is a resident unless he is a resident within the meaning of that term as herein defined of some other State, Territory or country. A natural person who is domiciled outside of this State is not a resident despite the fact that he is in this State for other than a temporary or transitory purpose if he was incompetent at the time he came into this State, and this fact is evidenced by a legal adjudication of incompetency either before or after he came into this State, and has remained incompetent during his sojourn in this State. Every natural person who spends in the aggregate more than nine months of the taxable year within the State or maintains a permanent place of abode within the State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that such person is in the State for a temporary or transitory purpose. Any natural person who is or shall become a resident of this State shall continue to be a resident even though temporarily absent from the State. Every natural person other than a resident is a nonresident."

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Sections 17013 and 17015 of the Revenue and Taxation Code, during the period July 1, 1945, to May 3, 1951, provided:

"17013. 'Resident' includes:

(a) Every individual who is in this State for other than a temporary or transitory purpose.

(b) Every individual domiciled within this State who is in some other state, territory, or country for a temporary or transitory purpose.

Any individual who is a resident of this State continues to be a resident even though temporarily absent from the State." (Underlining ours.)

"17015. Every individual who spends in the aggregate more than nine months of the taxable year within this State or maintains a permanent place of abode within this State shall be presumed to be a resident. The presumption may be overcome by satisfactory evidence that the individual is in the State for a temporary or transitory purpose." (Underlining ours.)

As of May 3, 1951, the underlined words in Section 17013 were replaced by "in" and "outside the State," respectively, and the underlined phrase in Section 17015 was deleted. With these amendments, the quoted sections were in effect during the period on appeal after May 3, 1951.

Regulation 17013-17015(b) of Title 18 of the California Administrative Code (in effect at the close of the period on appeal) and the predecessor regulation relating to Section 2(k) of the Personal Income Tax Act (Art. 2(k)-2), explain the meaning of "temporary or transitory purpose" as follows:

"Whether or not the purpose for which an individual is in this State will be considered temporary or transitory in character will depend to a large extent upon the facts and circumstances of each particular case. It can be stated generally, however, that if an individual is simply passing through this State on his way to another State or country, or is here for a brief rest or vacation, or to complete a particular transaction, or perform a particular contract, or fulfill a particular engagement, which will require his presence in this State for but a short period, he is in this State for temporary or transitory purposes, and will not be a resident by virtue of his presence here.

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"If, however, an individual is in this State to improve his health and his illness is of such a character as to require a relatively long or indefinite period to recuperate, or he is here for business purposes which will require a long or indefinite period to accomplish, or is employed in a position that may last permanently or indefinitely, or has retired from business and moved to California with no definite intention of leaving shortly thereafter, he is in the State for other than temporary or transitory purposes, and, accordingly, is a resident taxable upon his entire net income even though he may retain his domicile in some other State or country.

* * *

"The underlying theory of [the statutes] is that the State with which a person has the closest connection during the taxable year is the State of his residence. Consequently, where a person's time is equally divided between California and the State of **domicil**, he will not be held to be a resident of California.*'

Appellants' principal contention is that during none of the years in question were they residents of or domiciled in the State of California. However, upon considering the evidence in its entirety, together with the pertinent provisions of the law and regulations, it is our opinion that Appellants were, if not domiciled in California, at least here for other than a temporary or transitory purpose, and also that they had a closer connection with California than with any other state during the years involved. By 1943 they were spending more time in California than in any other state; they had a permanent place of abode in Ojai; Mrs. Cummings had acquired a ranch for her daughter in that vicinity which Mr. Cummings was attempting to operate as a business; the daughter then entered school in this State; Mr. Cummings' law practice in Chicago had dwindled almost to the vanishing point; and the center of the Cummings' family activities had shifted to California. Under these circumstances, it appears that their absences from this State were only temporary, notwithstanding the fact that they maintained a home and registered to vote in Illinois until 1945 and thereafter in Nevada. In view of the definition of resident in the applicable statutes and regulations, Appellants were residents of California during the years 1943 through 1954.

Appellants contend that the proposed penalties for failure to make and file timely returns are improper and unjustified because, in the words of former Section 15 of the Personal Income Tax Act and Section 18681 of the Revenue and Taxation Code, "the failure is due to reasonable cause and not due to wilful neglect" Reasonable cause such as to excuse a taxpayer's failure to file on time, has been construed under a similar Federal statute

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to mean such cause as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (Charles E. Pearsall & Son, 29 B.T.A. 747.) Regulation 17013-17015(f)(2), Title 18, California Administrative Code, provides in part:

"If an individual is presumed to be a resident during any taxable year or if any question as to his resident status exists, he should file a return, in order to avoid the possibility of the imposition of penalties, for that year even though he believes he was a non-resident and even though he received no income from sources within this State...."

The same language was contained in Art. 2(k)-6(b) of the former regulations. Until May 3, 1951, the statutes provided for a presumption of residence where a permanent place of abode was maintained in California. In view of the fact that Appellants owned a home in California and spent more than twice as much time here as in any other state, they had no reasonable cause for failing to file timely returns. We conclude that the penalties were properly-imposed.

~~Appellants also argue that the Franchise Tax Board does not~~ have the power under the California Constitution to determine the question of residence or what income is subject to tax; that even if Appellants were "residents" within the meaning of the tax law, of California, it is unconstitutional to impose a tax on their income derived from sources outside of this State; and that there is no adequate provision for court review of their case.

It cannot be doubted that the tax statutes contemplate that the Franchise Tax Board shall have the power to determine, subject to review, the question of residence and of what income is subject to tax (Sections 18582 and 18583 of the Revenue and Taxation Code). The statutes also contemplate that the entire income of a resident shall be taxed, regardless of whether the source of the income is outside of the State (former Sections 5 of the Personal Income Tax Act and 17052 of the Revenue and Taxation Code, now 17041 of the Revenue and Taxation Code).

Although it is our settled rule not to pass upon the constitutionality of a statute in an appeal such as this, it is noteworthy that of the many judicial opinions disposing of cases arising under the Personal Income Tax Law since its inception in 1935, none has raised the slightest doubt as to the power of the administering agency to determine facts or to interpret the taxing statute for the purpose of ascertaining the liability of a taxpayer. And it seems clear that there is no constitutional inhibition against subjecting a resident to a tax on his income

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regardless of where it is derived. (Lawrence v. State Tax Commission, 286 U. S. 276; New York ex rel, Cohn v. Graves, 300 U. S. 308; Bowring v. Bowers, 24 Fed. 2d 918; Wood v. Tawes, 28 A. 2d 850.) In so far as judicial remedies are concerned, Appellants may obtain a trial de novo in the Superior Court, with or without prior payment of the tax (Sections 19081 and 19082 of the Revenue and Taxation Code),

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests of Joseph W. and Elsie M. Cummings to proposed assessments of additional personal income tax, including penalties, for the following yaars and in the following amounts, be and the same is hereby, sustained:

	<u>Joseph W. Cummings</u>	<u>Elsie M. Cummings</u>	<u>Both, jointly</u>
1943	\$296.00	\$177.94	
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1952			\$1,617.13
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1954			3,035.60

Done at Sacramento, California, this 13th day of December,
1960, by the State Board of Equalization.

John W. Lynch, Chairman

Richard Nevins, Member

Paul R. Leake, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary